

## ***9 Official Opinions of the Compliance Board 199 (2014)***

- ◆ 2(E)(3) NOTICE: UNTIMELY WHEN GIVEN ONLY VIA WEBSITE  
THAT DAY, ABSENT EMERGENCY
- ◆ 6 MINUTES: POSTING ON WEBSITE, NOT REQUIRED
- ◆ 7(C) COMPLIANCE BOARD: NO AUTHORITY TO DISMISS  
COMPLAINT AS UNTIMELY
- ◆ 7(C) COMPLIANCE BOARD: NO AUTHORITY TO DECLARE THAT  
PUBLIC BODY “CURED” VIOLATION IN SUBSEQUENT OPEN  
MEETINGS

\*Topic numbers and headings correspond to those in the Opinions Index (2014 edition) at  
<http://www.oag.state.md.us/opengov/openmeetings/appf.pdf>

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January 5, 2015

Re: Montgomery County Board of Education  
*Janis Zink Sartucci, Complainant*

Janis Zink Sartucci, Complainant, alleges that the Montgomery County Board of Education (“school board”) violated the Open Meetings Act with regard to its September 5, 2012 meeting by failing to post notice reasonably in advance of the meeting and to adopt adequate minutes afterwards. The school board, by its attorney, urges us to reject the complaint as stale, denies violating the Act, and alternatively states that any violation was “cured” by its later public consideration of the matters addressed at the meeting.

### *A. Notice.*

Complainant states that the school board posted the meeting on its website “2 hours and 8 minutes before the start of the meeting.” The response states that the school board had announced the date orally at its August 23 meeting, that the failure to post the notice on the school board’s online calendar was inadvertent, that the oversight was “remedied” on the morning of the meeting, and that, under the circumstances, the notice constituted the “reasonable advance notice” required by the Act. *See* § 3-

302(a).<sup>1</sup> The response does not suggest that the school board was convening to address an emergency; to the contrary, it appears that the meeting involved the development of a set of “guiding tenets” that were finally adopted over a year later.

We find that the school board violated § 3-302(a). When a public body must meet on an urgent basis, it must give the best public notice feasible under the circumstances. In doing so, the public body should consider whether its usual methods of publishing notice will be effective. 9 *OMCB Opinions* 110, 115 (2014); see also 7 *OMCB Opinions* 237, 239 (2011) (explaining the need to use additional methods for urgently-called meetings). We have advised that simply posting a notice on the public body’s website shortly before the meeting is likely not effective; a public body cannot expect the public to continuously check its website. See 9 *OMCB Opinions* at 115.

The question then becomes what a public body should do when it discovers, shortly before a scheduled meeting, that it has not given notice. In our view, a public body in that situation has only two options: (1) if there is no emergency that must be addressed that day, it may postpone the meeting and give proper notice for a meeting at a later time; or, (2), if the meeting must be held that day, the public body may make good-faith efforts to reach its interested public by whatever method is likely to work.<sup>2</sup> The school board did neither of those things. Although a public body’s inadvertence in failing to post notice might bear on the judicial remedy for the omission, the question of intent does not bear on whether the public body complied with the notice requirement.

#### *B. Minutes.*

Complainant alleges that the minutes that the school board had posted online were inadequate because, she states, they appeared merely to be the meeting agenda and not a report of the actual events. Indeed, the document attached to the complaint refers to discussions in the future tense. The response states that the last page of the minutes was omitted from the document posted online and that the oversight has now been rectified. The response also questions why Complainant had not “requested a complete copy of the minutes years ago.”

We find that the full set of minutes that has now been posted online is adequate. As for the initial posting of an incomplete document, the Act does not require public bodies to post their minutes online; it merely

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<sup>1</sup> References are to the General Provisions Article of the Maryland Code. Section 3-302(a) provides: “Before meeting in a closed or open session, a public body shall give reasonable advance notice of the session.”

<sup>2</sup> Many public bodies maintain e-mail address lists of reporters and interested members of the public to communicate special announcements. The response does not reflect any effort by the school board to use that method for the September 5 meeting.

requires them to make minutes available for inspection upon request. *See* § 3-306. The initial posting therefore did not violate the Act. We add that nothing about the original posting signaled to the public that pages might be missing. If the mistake made here seems likely to recur, future such complaints might be avoided by noting, on the initial page, the number of pages that the online reader might expect to see.

*C. Other issues raised by the response.*

It might be helpful for us to briefly address the school board's request that we dismiss the complaint as "stale" and its assertion that any violations of the Act with respect to the September 5 meeting were "cured" by subsequent public discussions of the issues discussed there.

On the dismissal of complaints as untimely, the Act does not authorize us to dismiss complaints for that reason; in fact, legislation to impose a one-year statute of limitations failed in the 2011 session of the General Assembly. *See* 2011 House Bill 48. We rarely "dismiss" complaints. We have done so when it has been clear that the complained-of entity is not subject to the Act or that the complaint only involves laws other than the Act. We have also done so when we have already addressed a public body's violative practices, and the newer complaint simply alleges earlier instances of the same type of violation; in those matters, giving the same guidance again would be gratuitous. As for "staleness," when we do not have enough information to address the allegation because no one can remember the events, we exercise our authority under § 3-207(c)(2) to state our inability to resolve the complaint, but we do not dismiss it.

We also do not have the authority to declare a violation "cured." The response quotes a legal encyclopedia, 56 Am. Jur. 2d, Mun. Corp. § 149 (2011), for the proposition that "[v]iolations of an Open Meetings Act may be cured by fully and fairly considering the proposal during a public meeting following the last private one." That proposition might reflect the law of other states, but we have long interpreted Maryland's Act differently. As we explained to this school board in 2009, we have based our understanding of Maryland's Act on the clear instruction of the Court of Appeals in *City of New Carrollton v. Rogers*, 287 Md. 56, 72 (1980), that the public is entitled to observe every stage of the public body's deliberations, not just the later stages. *See* 6 *OMCB Opinions* 187,190 (2009) ("The Act extends to each step of the deliberative process."). Accordingly, for example, we have stated that public bodies violate the Act when they hold "pre-meetings" to discuss the discussion to be held in the public meeting. *See* 6 *OMCB Opinions* 69 (2009). We thus have not adopted the notion that the public body's later discussion of a matter in open session can truly "cure" the fact that a public body has discussed a matter out of the public eye. Although circumstances of a meeting will vary, and a public body of course should try to remedy its violations, we doubt how well a deliberative process can be truly recreated, especially for long meetings. The minutes of this meeting show that it lasted for over four hours.

In conclusion, we have found, first, that the school board violated the Act by failing to post notice of its September 5, 2012 meeting reasonably in advance, and, second, that the school board did not violate the Act with respect to the minutes of that meeting. We have also discussed our limited authority to “dismiss” complaints or declare violations cured.

Open Meetings Compliance Board

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